IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 83, Original

STATE OF MARYLAND,
STATE OF ILLINOIS,
STATE OF INDIANA,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MICHIGAN,
STATE OF NEW YORK,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,
STATE OF WISCONSIN,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

MOTION FOR JUDGMENT ON THE PLEADINGS AND BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

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Plaintiffs,

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Defendant.

MOTION FOR JUDGMENT ON THE PLEADINGS

The State of Maryland, the State of Illinois, the State of Indiana, the Commonwealth of Massachusetts, the State of Michigan, the State of New York, the State of Rhode Island and Providence Plantations, and the State of Wisconsin ("the plaintiff states"), by their undersigned attorneys, move the Court for judgment on the pleadings, and in support of this motion state:

1. On June 18, 1979, the Court granted the motion of the plaintiff states for leave to file their complaint and ordered the defendant State of Louisiana to answer within sixty days.

2. The defendant filed its answer on August 17, 1979.

3. As more fully appears from the accompanying brief, there is no genuine issue as to any material fact,

and the plaintiff states are entitled to judgment on the pleadings as a matter of law.

WHEREFORE, the plaintiff states request that the Court grant this motion and enter judgment as prayed in their complaint.

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Defendant.

BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

JURISDICTION

This is a suit between sovereign states, and, as such, it is within the exclusive original jurisdiction of this Court under article III, section 2, clauses 1 and 2 of the Constitution of the United States and section 1251(a)(1) of title 28 of the United States Code.

On June 18, 1979, the Court entered an order granting the motion for leave to file complaint.

QUESTIONS PRESENTED

1. Whether the Louisiana First Use Tax violates the supremacy clause of the United States Constitution and should be enjoined because it interferes with or impermissibly affects the comprehensive federal statutory schemes and dominant purposes of the Natural Gas Act, the Natural Gas Policy Act, and the Outer Continental Shelf Lands Act?

2. Whether the Louisiana First Use Tax contravenes the commerce clause of the United States Constitution and should be enjoined because it discriminates against interstate commerce and is not fairly apportioned?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, section 8, clause 3 of the Constitution of the United States provides as follows:

> The Congress shall have Power . . . To regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes.

2. Article VI, clause 2 of the Constitution of the United States provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. The First Use Tax on Natural Gas, La. Rev. Stat. Ann. §§ 47:1301-1307 (West Supp. 1979), is set out in full in the Appendix to this brief, *infra* at 1a-8a.

4. The First Use Tax on Natural Gas — Severance Tax Credit, La. Rev. Stat. Ann. § 47:647 (West Supp. 1979), is set out in full in the Appendix to this brief, *infra* at 9a-12a.

5. The First Use Tax Trust Fund, La. Rev. Stat. Ann. § 47:1351 (West Supp. 1979), is set out in full in the Appendix to this brief, *infra* at 13a-16a.

6. The Tax Credit for Electric and Natural Gas Service, La. Rev. Stat. Ann. § 47:11 (West. Supp. 1979), is set out in full in the Appendix to this brief, *infra* at 17a-20a.

STATEMENT

By this suit, Maryland, Illinois, Indiana, Massachusetts, Michigan, New York, Rhode Island and Wisconsin ("the plaintiff states") have invoked the original jurisdiction of this Court in order to challenge the constitutionality of the Louisiana First Use Tax on Natural Gas ("the First Use Tax").[1]

The First Use Tax, effective April 1, 1979, imposed a tax of seven cents per thousand cubic feet (Mcf) upon the first occurrence of any "use"[2] of natural gas within Louisiana. The alleged purpose of the tax is to prevent economic and physical waste of natural resources and to protect and provide compensation for adverse effects upon the state's shorelines, waterbottoms, and barrier islands. La. Rev. Stat. Ann. § 47:1303A (West Supp. 1979). Yet the tax explicitly provides that contractual provisions which would place responsibility for state taxes on the producers of natural gas are "against public policy and unenforceable to that extent." La. Rev. Stat. Ann. § 47:1303C (West Supp. 1979). Contemporaneously with the passage of the First Use Tax, the

[1] La. Rev. Stat. Ann. §§ 47:1301-1307 (West Supp. 1979). A copy of the First Use Tax is attached to the Complaint as Exhibit A and is also set out in full in the Appendix to this brief, *infra* at 1a-8a:

[2] Under the Act "use" includes, among other activities, the sale, transportation, or processing of natural gas, La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1979), but it does not include "natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state." La. Rev. Stat. Ann. § 47:1303A (West Supp. 1979).

Louisiana legislature enacted a severance tax credit[3] which permits instate producers liable for the First Use Tax to credit that liability, dollar-for-dollar, against their severance tax liability.

Moreover, the First Use Tax is not imposed on such gas as is otherwise subject to a severance, production, or import tax levied by any state, territory, or the United States. Because Louisiana imposes a severance tax on all intrastate production,[4] the incidence of the First Use Tax is solely upon natural gas produced outside Louisiana, which, for practical purposes, means natural gas produced from federal enclaves, including the outer Continental Shelf ("OCS"). The OCS is a domain under the control of the federal government outside the seaward boundaries of the State of Louisiana.[5] Gas from these federally-controlled domains is transported through Louisiana by interstate pipelines.[6]

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[3] First Use Tax on Natural Gas — Severance Tax Credit, La. Rev. Stat. Ann. § 47:647 (West Supp. 1979). A copy of the First Use Tax on Natural Gas — Severance Tax Credit is attached to the Complaint as Exhibit B and is also set out in full in the Appendix to this brief, *infra* at 9a-12a.

[4] La. Rev. Stat. Ann. § 47:631-646 (West 1970 & Supp. 1979). The severance tax on intrastate production of natural gas is also set at seven cents per Mcf. La. Rev. Stat. Ann. § 47:633(9) (West Supp. 1979).

[5] The outer Continental Shelf is defined and delineated in the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331-1343 (1976), *as amended by* Act of Sept. 18, 1978, Pub. L. No. 95-372, 92 Stat. 632 (codified at 43 U.S.C.A. §§ 1331-1356 (West Supp. 1979)). The Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1976), passed several months earlier in 1953, draws the line of demarcation between state and federal domains. The importance and value of the vast natural resources of the outer Continental Shelf are attested to by sea boundary disputes between Louisiana and the United States. United States v. Louisiana, 363 U.S. 1 (1960).

[6] Each of these pipelines is a "natural gas company" as defined in section 2 of the Natural Gas Act of 1938, 15 U.S.C. § 717a(6) (1976), and is regulated by the Federal Energy Regulatory Commission. As part of the Natural Gas Act's

The Federal Energy Regulatory Commission ("the FERC"), through the adoption of an automatic tracking mechanism,[7] has provided a procedure for consumer reimbursement of First Use Tax payments by pipelines. Although these charges are being collected subject to refund pending final judicial determination of the constitutionality of the tax, the immediate burden and incidence of the tax is being passed on directly to ultimate consumers.

Based on the volumes of natural gas entering Louisiana from the OCS in 1977, it has been estimated by the FERC that the First Use Tax will be imposed on approximately 3,190 million Mcf[8] resulting in the

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comprehensive regulatory scheme, the purchase of natural gas from producers, its transportation in interstate commerce, and its sale to distribution companies must be made pursuant either to certificates of public convenience and necessity or rate schedules or tariffs issued or approved by the Federal Energy Regulatory Commission.

[7] State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order No. 10, "Order Establishing Procedures Governing Pipeline Recovery of the State of Louisiana First Use Tax," issued August 28, 1978, 43 Fed. Reg. 45,553 (Oct. 3, 1978); Order No. 10-A, "Order on Rehearing, Modifying Prior Order, Amending Regulation and Requesting Comment," issued December 20, 1978, 43 Fed. Reg. 60,438 (Dec. 28, 1978), *appeal docketed,* Tennessee Gas Pipe Line Co. v. Fed. Energy Regulatory Comm'n, No. 78-38-13, et al. (5th Cir. Dec. 26, 1978); Order No. 10-B, "Order on Rehearing, Modifying Prior Order and Amending Regulations," issued March 2, 1979, 44 Fed. Reg. 13,460 (Mar. 12, 1979); and "Order Directing the Solicitor to Seek Either an Order of the Court Permitting the Commission to Modify Its Orders or a Remand of the Record" app. A, issued July 13, 1979, 44 Fed. Reg. 46,291 (Aug. 7, 1979).

[8] This estimate is based on total OCS production entering Louisiana in 1977 of 3,647,513,674 Mcf, less 220 million Mcf in shrinkage during processing, 100 million Mcf reserved for the producer's own use or direct industrial sales, and 140 million Mcf consumed in the production of fertilizer and anhydrous ammonia in Louisiana. *See* Complaint, paragraph 14, Fed. Energy Regulatory Comm'n v. McNamara, Civil Action No. 78-384 (M.D. La., filed Sept. 29, 1978). The First Use Tax will also be imposed upon all volumes of natural gas that may be imported from foreign countries without severance taxes and imported through Louisiana.

imposition of a charge on consumers exceeding 225 million dollars in the first year. "Order Directing the Solicitor to Seek Either an Order of the Court Permitting the Commission to Modify Its Orders or a Remand of the Record" app. A, issued July 13, 1979, 44 Fed. Reg. 46,291, 42,292 (Aug. 7, 1979).

On March 29, 1979, the plaintiff states filed a motion for leave to file a complaint, a complaint, and a brief in support asking that this Court invoke its original jurisdiction over this matter. Louisiana responded with a brief opposing the acceptance of jurisdiction. This Court granted the plaintiffs' motion for leave to file the complaint on June 18, 1979, giving the defendant State of Louisiana sixty days within which to answer the complaint.

Louisiana filed its answer on August 17, 1979, and at the same time moved for the appointment of a special master to determine what Louisiana alleges are "many issues of fact." The defendant has failed to file any memorandum in support of this motion and in its twenty-seven page answer to the complaint, Louisiana has devoted only a single page to this question. Answer ¶LXX. There it simply lists eight subjects of "factual controvers[y]" that it maintains require "extensive evidentiary hearings." *Id.* While one of these subjects, the second relating to alleged environmental damage, may raise a factual issue, it, as well as each and every other subject, is irrelevant to the issues presented by this motion or is merely an attempted contradiction of the legal conclusions asserted by the plaintiff states.

Not a single subject of the alleged "factual controvers[y]" meets the claim by the plaintiff states that the First Use Tax is in conflict with and repugnant to federal statutes and is accordingly void under the supremacy clause of the United States Constitution. Similarly, none is relevant to the purely legal contentions under the commerce clause that the plaintiff states press in their current motion. These supremacy clause and commerce clause claims, the plaintiff states urge, should be dispositive of this litigation. Finally, it

is to be noted that for the purposes of their motion the plaintiff states have not included any claim presented by their complaint that even remotely may require factual development.[9]

The plaintiff states submit that they clearly demonstrate in this brief why this case is an appropriate one for judgment on the pleadings. For these reasons, and because Lousiana's answer does not even remotely suggest anything that would make this case inappropriate for judgment on the pleadings on the issues herein briefed, the plaintiff states submit that the grant of judgment as prayed in their complaint is proper.

SUMMARY OF ARGUMENT

The plaintiff states have moved for judgment on the pleadings contending that as a matter of law the Louisiana First Use Tax is violative of the supremacy clause and the commerce clause of the United States Constitution.

Supremacy Clause — Interference With the Natural Gas Act

The Louisiana First Use Tax, by taxing the volume of interstate gas, protecting instate interests through exemption and tax credit, making the tax a "cost" of marketing gas, and abrogating certain tax shifting contracts, is a tax on natural gas or its severance and an indirect attempt to regulate the interstate transportation and sale of natural gas. *Northern Natural Gas Co. v. State Corporation Commission of Kansas,* 372 U.S. 84 (1963); *Portland Pipeline Corp. v. Environmental Improvement Commission,* 307 A.2d 1 (Me.), *appeal dismissed,* 414 U.S. 1035 (1973). The tax interferes with the Federal Energy Regulatory Commission's pervasive ratemaking jurisdiction and discretion with regard to cost determination by forcing interstate consumers to

[9] The plaintiff states continue to believe that these other claims are genuine and could be decided summarily. The purpose of this brief, however, is to present argument beyond that appearing in the brief in support of the motion for leave to file the complaint on the issues on which judgment on the pleadings appears most appropriate.

bear the burden of the tax in the form of higher prices. Louisiana's scheme conflicts with the purposes of the Natural Gas Act by subjecting interstate consumers to excessive charges and by preventing equality of treatment among producing and consuming states. *Atlantic Refining Co. v. Public Service Commission of New York,* 360 U.S. 378 (1959); *FPC v. East Ohio Gas Co.,* 338 U.S. 464 (1950); *FPC v. Hope Natural Gas Co.,* 320 U.S. 591 (1944). By abrogating contractual provisions requiring reimbursement of the tax by producers, the First Use Tax interferes with the Commission's exclusive jurisdiction under 15 U.S.C. § 717 (1976) to determine the terms and conditions under which gas may be sold or transported in interstate commerce.

Supremacy Clause — Preemption by Outer Continental Shelf Lands Act

The clear thrust of the First Use Tax is to impose a severance tax on natural gas produced outside of Louisiana and particularly on the outer Continental Shelf. The Outer Continental Shelf Lands Act provides that state taxation laws shall not apply to the outer Continental Shelf. 43 U.S.C.A. § 1333(2) (A) (West Supp. 1979). This express provision, as well as the purpose of the Outer Continental Shelf Lands Act in providing for orderly natural gas development, are contravened by the Louisiana taxing scheme.

Commerce Clause — First Use Tax is a Tax on Interstate Commerce

The flow of natural gas in pipelines to points outside a state constitutes interstate commerce. *FPC v. East Ohio Gas Co.,* 338 U.S. 464 (1950). A state may not directly tax the flow of natural gas in interstate commerce. *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954). The "uses" purportedly taxed under the Louisiana scheme are artificial and not separate local activities that may be taxed.

Commerce Clause — Facial Discrimination Against Interstate Commerce

The First Use Tax is discriminatorily imposed only on gas imported into Louisiana. It does not apply to gas produced in Louisiana or to gas transported into Louisiana from a state that imposes a severance tax. In practical effect, it is a tax on the transmission of outer Continental Shelf and other imported natural gas into and through Louisiana. Because of the heavy burden likely to be imposed on out-of-state taxpayers, the Louisiana severance tax is not equivalent to the First Use Tax. *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963). The First Use Tax in conjunction with the severance tax credit discriminatorily favors pipeline companies that produce natural resources subject to the Louisiana severance tax and burdens those that do not. Finally, the tax discriminates against interstate commerce by exempting certain users from the tax.

Commerce Clause — Lack of Fair Apportionment

The First Use Tax is measured by total volume of the gas and is not related to any identifiable activity within the State of Louisiana. It is a tax on the gas and in economic effect a severance tax on gas produced outside Louisiana. Identifiable activities related to interstate natural gas are already subject to a comprehensive program of taxation in Louisiana. Because the tax is unfairly apportioned, it permits a multiple burden on interstate commerce. *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157 (1954).

Entitlement to Judgment on the Pleadings

The questions raised in this motion are purely legal. Louisiana's answer denies only legal conclusions, not issues of fact that are material to the resolution of this motion. All of the facts material to the determination of this controversy in its present posture have been admitted by Louisiana in its answer, already found

authoritatively by this Court, or are subject to its judicial notice.

ARGUMENT

I.

THE LOUISIANA FIRST USE TAX VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

The Louisiana First Use Tax is aimed only at interstate consumers of natural gas. Through a combination of exemption and tax credit, it immunizes instate distributors and protects instate consumers. The tax, which is measured by volume, attaches to the interstate gas itself, not to any actual "use" in the State of Louisiana. By abrogating tax shifting contracts and declaring the tax to be a cost of marketing the gas, the Louisiana statute attempts to tie the hands of the FERC on cost determination and to force out-of-state consumers to pay the tax. The First Use Tax pretends to be a measure aimed at protecting the environment and ensuring instate tax equity. This pretense, however, is simply statutory window dressing. It cannot disguise the true purpose of the First Use Tax — clear on its face — which is to generate extraordinary sums at the expense of interstate consumers. Nor can it disguise the clear effect of the First Use Tax, which is to cause multiple violations of the supremacy clause by placing improper obstacles in the way of the following federal statutory schemes: the Natural Gas Act of 1938, 15 U.S.C. §§ 717-717w (1976), *as amended by* Act of Nov. 9, 1978, Pub. L. No. 95-617, 92 Stat. 3167 (codified at 43 U.S.C.A. §§ 717-717z (West 1974 & Supp. 1979)); the Natural Gas Policy Act of 1978, Pub. L. No. 95-62, 92 Stat. 3350 (codified at 15 U.S.C.A. §§ 3301-3432 (West Supp. 1979)); and the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331-1343 (1976), *as amended by* Act of Sept. 18, 1978, Pub. L. No. 95-372, 92 Stat. 632 (codified at 43 U.S.C.A. §§ 1331-1356 (West Supp. 1979)).

The First Use Tax is a carefully contrived effort by a single state to tax the interstate transportation and sale of natural gas, an area within the exclusive jurisdiction of the federal government. It is an attempt to exploit out-of-state consumers with excessively high prices, usurp the power of the FERC with regulation masked as taxation, and hinder the development of gas from the outer Continental Shelf by imposing a tax that federal law expressly prohibits. Accordingly, the First Use Tax patently violates the supremacy clause of the Constitution and must be enjoined.

In *McCulloch v. Maryland,* 17 U.S. (4 Wheat) 316 (1819), Chief Justice Marshall said of the supremacy clause, U.S. Const. art. VI, cl. 2,[10] that:

> It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence.

17 U.S. (4 Wheat) at 427.

More recently, in *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 157-58 (1978), this Court held that the supremacy clause invalidates or preempts state legislation when:

1. The scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; *or*

2. The federal law touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject; *or*

3. The object sought to be obtained by the federal law and the obligations imposed by it reveal a purpose to dominate state law; *or*

[10] Art. VI, cl. 2, provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

4. The state law stands as an obstacle to the accomplishment and execution of full purposes and objectives of Congress.[11]

See also Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) ("[W]hen Congress has 'unmistakably . . . ordained' . . . that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.").

Application of these principles to a state statute presents only legal questions. *Douglas v. Seacoast Products*, 431 U.S. 265, 271-72 (1977); *Philadelphia v. New Jersey*, 430 U.S. 141 (1977). Thus this Court should not hesitate to invalidate the Louisiana First Use Tax.

A. *The Louisiana First Use Tax is an Impermissible Attempt to Regulate the Transportation and Sale of Natural Gas in Interstate Commerce and thus Violates the Natural Gas Act.*

On numerous occasions this Court has examined the scope and purposes of the Natural Gas Act of 1938. 15 U.S.C. §§ 717-717w (1976), *as amended by* Act of Nov. 9, 1978, Pub. L. No. 95-617, 92 Stat. 3167 (codified at 43 U.S.C.A. § 717-717z (West 1974 & Supp. 1979)). In the Natural Gas Act, Congress "meant to create a comprehensive and effective regulatory scheme." *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972); *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 520 (1947). The Act confers on the Federal Energy Regulatory Commission jurisdiction over the transportation and sale for

[11] In the first three situations, even harmonious state regulation must nevertheless be invalidated under the supremacy clause. DeCanas v. Bica, 424 U.S. 351, 356 (1976). In the latter case, a state statute is void to the extent it conflicts with federal law. Ray v. Atlantic Richfield Co., 435 U.S. at 158.

resale of natural gas in interstate commerce, 15 U.S.C. § 717 (1976), and preempts the exercise of such regulatory powers by the states. Although the Natural Gas Act envisions a dual state-federal regulatory authority in many matters, it leaves to the states no room for direct regulation, *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943), or indirect regulation, *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963), of the transportation and sale for resale of natural gas in interstate commerce.[12]

Under section 4(a) of the Natural Gas Act, 15 U.S.C. § 717c(a) (1976), all rates and charges made by a natural gas company subject to FERC jurisdiction must be "just and reasonable." In addition, companies must file with the FERC a schedule of their rates and charges for transportation and sale of natural gas subject to the Commission's jurisdiction as well as all contracts that may affect such rates and charges. 15 U.S.C. § 717c(c) (1976). Changes in rates, charges, services, and contracts must be filed in advance with the Commission, which can suspend them. 15 U.S.C. § 717c (1976). Section 5 of the Act, 15 U.S.C. § 717d (1976), gives the FERC certain powers to fix rates and charges and section 6, 15 U.S.C. § 717e (1976), authorizes the Commission for rate making and other purposes to ascertain the cost of the property of every natural gas company.[13] Section 7 of the Natural Gas Act of 1938, 15

[12] This Court has also observed that federal natural gas regulation "would be hamstrung if it were tied down to technical concepts of local law," United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 400 (1965), and that Natural Gas Act jurisdiction is not defeated because local interests may in some degree be affected. Interstate Natural Gas Co. v. FPC, 331 U.S. 682 (1947).

[13] Under 15 U.S.C. § 717d(a) (1976), the FERC may investigate and determine the cost of production or transportation of natural gas even in cases where the Commission lacks ratemaking jurisdiction. Section 110 of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified

U.S.C. § 717f (1976), *as amended by* Act of Nov. 9, 1978, Pub. L. No. 95-617, 92 Stat. 3173 (codified at 43 U.S.C.A. § 717f (West Supp. 1979)), requires natural gas companies to obtain from the Commission a certificate of public convenience and necessity before engaging in the transportation of natural gas.

A key purpose of these far-reaching provisions of the Natural Gas Act is "to protect ultimate consumers of natural gas from excessive charges." *FPC v. Interstate Gas Co.*, 336 U.S. 577, 581 (1949). *See also Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 388-89 (1959) ("The Act was so framed as to afford consumers a complete, permanent, and effective bond of protection from excessive rates and charges . . . . The overriding intent of the Congress [is] to give full protective converage to the consumer as to price . . . ."). In addition this Court has said that the FPC (now the FERC) "must be free to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 331 (1974).[14] Similarly, the Natural Gas Act recognizes "the importance of nationally controlling interstate pipelines in order to preserve 'equality of opportunity and treatment among the various communities and states concerned.'" *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 471 (1950). *See also Louisiana v. FPC*, 476 F.2d 140, 142 (5th Cir. 1973) ("A major purpose [of the Natural Gas Act] was to prevent the 'haves' from being unfair to the 'have nots.'"). Finally, this Court has taken particular note of the conflict between producing and consuming states over

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at 15 U.S.C.A. § 3320 (West Supp. 1979)), also authorizes the FERC to permit certain production-related costs to be reflected in the price of natural gas.

[14] This principle of equity and Commission flexibility "has obvious applicability in this time of acute energy shortage." 417 U.S. at 331.

state or federal regulatory authority as a factor justifying federal regulation:

> The unavoidable conflict between producing States and consuming States will create contradictory regulations that cannot possibly be equitably resolved by the courts. With these problems in mind, the desirability of uniform federal regulation is abundantly clear.

FPC v. Louisiana Power & Light Co., 406 U.S. 621, 633-35 (1972).

Thus, overcoming the balkanization of natural gas regulation and the discriminatory practices of gas-producing states is a dominant purpose of the Natural Gas Act. In light of the supremacy clause, the existence of such an intent on the part of a state statute is fatal, particularly where the state regulation is unmistakably aimed at interstate purchasers. *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, 92 (1963).[15]

[15] In *Northern Natural Gas*, this Court, on supremacy clause grounds, invalidated a state regulation requiring gas companies to take ratably from all wells, and it noted:

> The danger of interference with the federal regulatory scheme arises because these orders are unmistakably and unambiguously directed at *purchasers* who take gas in Kansas for resale after transportation in interstate commerce. In effect, these orders shift to the shoulders of interstate purchasers the burden of performing the complex task of balancing the output of thousands of natural gas wells within the State, cf. Miller Bros. Co. v. Maryland, 347 U.S. 340 — a task which would otherwise presumably be the State Commission's. Moreover, any readjustment of purchasing patterns which such orders might require of purchasers who previously took unratably could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States. This relationship is a matter with respect to which Congress has given the Federal Power Commission paramount and exclusive authority. See Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 610. The prospect of interference with the federal

The Louisiana First Use Tax is unmistakably aimed at interstate consumers of natural gas. The tax rate is applied not to any factor gauging intrastate activities, *e.g.*, gross receipts of certain uses, but to an obvious interstate factor — the volume of the gas. La. Rev. Stat. Ann. § 47:1303B (West Supp. 1979). The tax is imposed only if no state severance tax is due or has been paid on the gas. La. Rev. Stat. Ann. § 47:1303A (West Supp. 1979). Thus, gas produced in Louisiana and subject to that state's severance tax is not subject to the First Use Tax. A companion measure to the First Use Tax insures intrastate immunity by permitting taxpayers liable for that tax to credit that liability against their liability for the Louisiana severance tax. La. Rev. Stat. Ann. § 47:647A (West Supp. 1979). The tax is declared to be a "cost" associated with uses made by the owner in preparation of marketing of the natural gas, La. Rev. Stat. Ann. § 47:1303C (West Supp. 1979), and the statute renders unenforceable contracts requiring producers to pay the tax. La. Rev. Stat. Ann. § 47:1303C (West Supp. 1979). These provisions are clearly intended to cause the tax to be passed along to interstate consumers. Thus the tax is intended to add to the price of such gas while leaving unaffected intrastate gas.

This legislation strikes at the heart of the Natural Gas Act. First, no amount of statutory rhetoric, *see* La. Rev. Stat. Ann. § 47:1303E (West Supp. 1979), can

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regulatory power in this area is made even more acute by the fact that criminal sanctions imposed by state statute for noncompliance fall upon such purchasers and not upon the local producers. Therefore, although collision between the state and federal regulation may not be an inevitable consequence, there lurks such imminent possibility of collision in orders purposely directed at interstate wholesale purchasers that the orders must be declared a nullity in order to assure the effectuation of the comprehensive federal regulation ordained by Congress.

372 U.S. at 92.

disguise the fact that the First Use Tax is a tax on natural gas itself or its severance.[16] As far as interstate transportation of natural gas is concerned, few if any of the "uses" purportedly taxed by the statute, La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1979), involve any separate local activity. The form of the gas is not changed in any way because it passes through Louisiana. *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157, 169 (1954). In fact, the tax rate is actually applied not to any factor purporting to measure local use but to the volume of the gas. In *Portland Pipeline Corp. v. Environmental Improvement Commission,* 307 A.2d 1 (Me.), *appeal dismissed,* 414 U.S. 1035 (1973), this Court and the Supreme Judicial Court of Maine upheld the validity of a one-half cent per barrel license fee imposed by Maine upon the transportation of oil over its harbor waters. The argument was raised that the license fee burdened imports (i.e., the oil itself), but the Supreme Judicial Court of Maine found that the fee was imposed upon the offloading of oil.

> The license fee is completely unrelated to the value of the oil. It may be argued that the fee is imposed directly on the goods rather than on the activity of off loading because it is based upon volume. But although volume is not an unusual method of taxing goods, it is here an accurate gauge of the activity being taxed.
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> It is also of importance that the volume of oil offloaded is directly related to the danger that the Act seeks to guard against.
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> This present view of the tax as it will at first be applied is limited to short range application. *Over the long run the tax is not related to volume but strictly to the hazard of overwater oil transportation.*
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> *When the Fund reaches the statutory limit, the imposition of the tax is ended.*

[16] In Colonial Pipeline Company v. Traigle, 421 U.S. 100, 113 (1975), this Court sagely observed that "an otherwise unconstitutional tax is not made the less so by masking it in words cloaking its actual thrust."

> Administrative and research costs and unreimbursed cleanup costs may cause collection of the tax to be resumed periodically. *The imposition of a charge upon the offloading of oil, over the long run, bears no relationship to either value or volume of imported oil* and are thus not fees imposed "on Imports or Exports."

307 A.2d at 33-34 (emphasis supplied).

In the present case, the Louisiana Tax contains none of the saving features that enabled the Maine license fee to withstand the challenge that it represented a tax on the goods themselves. Over the long run the First Use Tax is related *solely to volume*. It contains no statutory limit. Therefore, it is a tax on natural gas.

Second, the Louisiana statute interferes with the ratemaking jurisdiction of the FERC. This is an area where federal regulation is so pervasive and the federal interest so dominant that even *indirect* state action and the *possibility* of state interference is sufficient to invalidate the statute. *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963). *See also Oklahoma Corporation Commission v. FPC*, 415 U.S. 961 (1974) (*mem.*), *aff'g* 362 F. Supp. 522 (W.D. Okla. 1973). As this Court noted in *FPC v. United Gas Pipe Line Co.*, 386 U.S. 237, 243 (1967):

> One of [the Commission's] statutory duties is to determine just and reasonable rates which will be sufficient to permit the company to recover its costs of service and a reasonable return on its investment. Cost of service is therefore a major focus of inquiry. Normally included as a cost of service is a proper allowance for taxes, including federal income taxes. The determination of this allowance, as a general proposition, is obviously within the jurisdiction of the Commission.

The Louisiana First Use Tax could hardly be said to leave any room for the exercise of the Commission's statutory discretion with respect to permitting the tax to be reflected in natural gas rates. The statute

characterizes the First Use Tax as a cost and abrogates agreements which would place that burden on anyone other than the purchasers of the gas. Control by the FERC over cost-passthrough, like its authority over continuance of service (examined last term by this Court in *United Gas Pipe Line Co. v. McCombs*, ___ U.S. ___, 99 S. Ct. 2461 (1979)), "is a fundamental component of the regulatory scheme. To deprive the Commission of this authority, even in limited circumstances, would conflict with basic policies underlying the [Natural Gas] Act." *Id.* at 2467.[17]

Third, the Louisiana First Use Tax conflicts with the purposes of the Act by subjecting interstate consumers to excessive charges and by preventing equality of treatment among producing and consuming states. As this Court noted in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 612 (1944) (footnote omitted):

[17] The First Use Tax also conflicts with the FERC's cost-passthrough authority under section 110(a)(2) of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified at 15 U.S.C.A. § 3320(a)(2) (West Supp. 1979)). The tax, in addition, raises questions under section 110(b) of the 1978 Act (codified at 15 U.S.C.A. § 3320(b) (West Supp. 1979)). That section provides that:

> The State severance tax allowable . . . with respect to the production of any natural gas may not include any amount of State severance taxes borne by the seller which results from a provision of State law enacted on or after December 1, 1977, unless such provision of law is equally applicable to natural gas produced in such State and delivered in interstate commerce and to natural gas produced in such State and not so delivered.

Because of the broad definition of "state severance tax" contained in the Natural Gas Policy Act of 1978, because the purpose of the First Use Tax, La. Rev. Stat. Ann. § 47:1301A (West Supp. 1979), and its effect make it akin to a severance tax on out-of-state gas, and because the outer Continental Shelf off of Louisiana may be considered as a federal enclave in the state, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 355 (1969), the First Use Tax may be considered a severance tax on natural gas "produced" in the state and not uniformly applied to interstate and intrastate sales as required by section 110(b).

> We cannot find in the words of the Act or in its history the slightest intimation or suggestion that the exploitation of consumers by private operators through the maintenance of high rates should be allowed to continue provided the producing states obtain indirect benefits from it.[18]

In *Corporation Commission of Oklahoma v. FPC,* 415 U.S. 961 (1974) (*mem.*), this Court affirmed a district court decision which invalidated state orders relating to wellhead price of natural gas. The lower court decision in large part relied upon the fact that the state orders challenged would have had an annual impact of more than $30 million upon the interstate consumer. *FPC v. Corporation Commission of Oklahoma,* 362 F. Supp. 522, 533 (N.D. Okla. 1973). Louisiana's First Use Tax will cost the consumers of the affected states ten times as much. Because the Louisiana statute is designed to enrich Louisiana's coffers solely at the expense of consuming states, it interferes with the purposes of the Natural Gas Act.

In summary, the Louisiana First Use Tax is an indirect attempt to regulate the transportation and sale of natural gas in interstate commerce. *Northern Natural Gas Co. v. State Corporation Commission of*

[18] In *Hope Natural Gas Co.,* West Virginia contended that the FPC in fixing a rate for natural gas produced in the state should have considered conservation of the state's gas deposits and the possible impairment of its tax structure rather than the benefit of out-of-state consumers. However, this Court replied that:

> . . . Congress was quite aware of the interests of the producing states in their natural gas supplies. But it left the protection of those interests to measures other than the maintenance of high rates to private companies. If the Commission is to be compelled to let the stockholders of natural gas companies have a feast so that the producing states may receive crumbs from that table, the present Act must be redesigned. Such a project raises questions of policy which go beyond our province.

320 U.S. at 613-14.

Kansas, 372 U.S. at 92.[19] Because of its design and effect it is markedly different than sustainable state taxes which may affect natural gas companies. In addition, because the First Use Tax takes aim at interstate consumers and at the FERC ratemaking and cost-passthrough process and because it compromises the laudable purposes of the Natural Gas Act, it should be gauged by those cases which invalidate *state regulation* inconsistent with the Natural Gas Act. *See Corporation Commission of Oklahoma v. FPC*, 415 U.S. 961 (1974); *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963). The First Use Tax intrudes upon pervasive federal natural gas regulation, frustrates the purposes of the Natural Gas Act, and harms an area where the federal interest is dominant.[20] For these reasons, is violates the supremacy clause of the United States Constitution and it invalid in its entirety.

The First Use Tax also violates the supremacy clause in that it declares contractual provisions requiring reimbursement by producers of costs incurred by pipelines (including taxes) "to be against public policy and unenforceable to that extent." La. Rev. Stat. Ann. § 47:1303C (West Supp. 1979). Section 7(c) of the Natural Gas Act of 1938, 15 U.S.C. § 717f(c) (1976), *as amended by* Act of Nov. 9, 1978, Pub. L. No. 95-617, 92 Stat. 3173

[19] Louisiana's attempt to cloak the First Use Tax "in the currently fashionable garb of environmental protection," Douglas v. Seacoast Products, Inc., 431 U.S. 265, 285 n.21 (1977), will not save the statute. In *Northern Natural Gas*, this Court held that state conservation measures aimed directly at interstate purchasers cannot be sustained when they threaten the comprehensive scheme of federal regulation contained in the Natural Gas Act. 372 U.S. at 94.

[20] *See* "Order Directing the Solicitor to Seek Either an Order of the Court Permitting the Commission to Modify Its Orders or a Remand of the Record" app. A, 44 Fed. Reg. 46, 291, 46, 292 (Aug. 7, 1979) ("The Commission is of the opinion that the First Use Tax is unconstitutional and directly interferes with paramount federal authority to determine rates and charges, and to issue certificates of public convenience and necessity, for the transportation or sale of natural gas in interstate commerce.").

(codified at 43 U.S.C.A. § 717f (West Supp. 1979)), provides that no person may sell or transport natural gas in interstate commerce for resale without first obtaining a certificate of public convenience from the Commission. These certificates are sought and obtained in full recognition of the terms and conditions of the underlying contract for the sale of natural gas. *See, e.g., Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 387 (1959). Indeed, as the Federal Energy Regulatory Commission has noted, numerous contracts contain provisions requiring the producer or gatherer selling natural gas to an interstate pipeline to reimburse the pipeline for all costs (including any taxes) incurred as a result of extracting natural gas, liquids, or other treatment of the gas. State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order No. 10-B, 44 Fed. Reg. 13,460, 13,462 (Mar. 12, 1979).Thus, the contract nullification provision of the First Use Tax, La. Rev. Stat. Ann. § 47:1303C (West Supp. 1979), by purporting to abrogate such provisions, conflicts with the federal regulatory scheme and violates the supremacy clause.

Moreover, changes in existing contracts underlying certificated sales of natural gas may be effected only by an amendment of the certificate by the Commission. 15 U.S.C. § 717c(d) (1976). Such changes cannot be made unless there is thirty days' notice to the FERC and the public, absent an FERC order to the contrary. *Id.* Thus, Congress has vested the Commission with exclusive jurisdiction to determine the terms and conditions under which natural gas may be sold or transported in interstate commerce. 15 U.S.C. § 717 (1976). The contract nullification provision of the First Use Tax, insofar as it attempts to proscribe reimbursement provisions incorporated into certificates issued by the Commission, violates the supremacy clause and is null, void, and of no effect.[21]

[21] In light of the importance of the contract nullification provisions to the taxing scheme, *see* section 4 of the First Use Tax law, Act No. 294, § 4, 1978 La. Sess. Law Serv. 482 (West), *infra* at 8a, the entire scheme must fall.

B. *The Louisiana First Use Tax is Preempted by the Outer Continental Shelf Lands Act.*

In 1953, Congress enacted the Outer Continental Shelf Lands Act of 1953, ch. 345, 67 Stat. 462, to provide for the orderly development of offshore resources. *United States v. Maine*, 420 U.S. 515, 527 (1975). To this end section 3(a) of the Act, 43 U.S.C. § 1332(a) (1976), *as amended by* Act of Sept. 18, 1978, Pub. L. No. 95-372, 92 Stat. 634 (codified at 43 U.S.C.A. § 1332 (West Supp. 1979)), stated:

> It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.

In essence, this property was to be considered as a federal enclave in an upland state. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 355 (1969). The Act also authorized the granting of oil and gas leases to qualified bidders "to meet the urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf." 43 U.S.C. § 1337(a) (1976), *as amended by* Act of Sept. 18, 1978, Pub. L. No. 95-372, 92 Stat. 640 (codified at 43 U.S.C.A. § 1337(a) (West Supp. 1979)).[22]

This Court has noted on more than one occasion the enormous development of oil and gas in the outer Continental Shelf which was made possible by the Act. For example, in *United States v. Maine*, this Court said of the Outer Continental Shelf Lands Act:

> Since 1953, when this legislation was enacted, 33 lease sales have been held, in which 1,940 leases, embracing over eight million acres, have been issued. The Outer Continental Shelf, since 1953, has yielded over three billion barrels of oil, 19 trillion mcf of natural gas, 13 million long tons of

[22] The payment of royalties was also required as one of the costs of such development. *Id.*

> sulfur, and over four million long tons of salt. In 1973 alone, 1,081,000 barrels of oil and 8.9 billion cubic feet of natural gas were extracted daily from the Outer Continental Shelf. Exploitation of our resources offshore implicates a broad range of federal legislation, ranging from the Longshoremen's and Harbor Workers' Compensation Act, incorporated into the Outer Continental Shelf Lands Act, to the more recent Coastal Zone Management Act.

420 U.S. at 527-28 (footnotes omitted).

More importantly, in *Atlantic Refining Co. v. Public Service Commission of New York,* 360 U.S. 378 (1959), this Court displayed appropriate sensitivity to the need of consumers of Continental Shelf gas to be free from exploitative prices. In holding that the Federal Power Commission was justified in initially not permanently certificating a sale of natural gas from the Continental Shelf until the rate level was shown to be in the public interest, this Court said:

> This is especially true where, as here, the initial price will set a pattern in an area where enormous reserves of gas appear to be present. We note that in petitioners' proof a map of the Continental Shelf area off of the coast of Louisiana shows that the leases here involved cover but 17 out of a blocked-out area covering some 900 blocks of 5,000 acres each. The potential of this vast acreage, in light of discoveries already made as shown by the record, is stupendous. The Commission has found that the transaction here covers the largest reserve ever committed to interstate commerce in a single sale. Indications are that it is but a puff in comparison to the enormous potentials present under the sea bed of the Gulf. The price certificated will in effect become the floor for future contracts in the area. This has been proven by conditions in southern Louisiana where prices have now vaulted from 17 cents to over 23 cents per MCF. *New price plateaus will thus be created as new contracts are made and unless controlled will result in "exploitation" at the expense of the consumer, who eventually pays for the increases in his monthly bill.*

360 U.S. at 390 (emphasis added). Thus, it came as no surprise when, in 1975, this Court specifically enjoined Louisiana from interfering with the exclusive rights of the United States in the lands, minerals, and resources in the area of the Continental Shelf. *United States v. Louisiana,* 422 U.S. 13 (1975).

Without a doubt, Louisiana could not directly tax the natural gas produced on the outer Continental Shelf. The Outer Continental Shelf Lands Act expressly prohibits it. 43 U.S.C. § 1333(a)(2) (1976), *as amended by* Act of Sept. 18, 1978, Pub. L. No. 95-372, 92 Stat. 635 (codified at 43 U.S.C.A. 1333(2)(A) (West Supp. 1979)) ("State taxation laws shall not apply to the outer Continental Shelf.") This state tax prohibition, re-enacted in 1978 in the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629, demonstrates congressional recognition that such taxation will impede the purpose of the Act in providing for the orderly development of shelf resources. Even in the absence of such a prohibition, this taxation would be prohibited. *See Mississippi River Fuel Corp. v. Cochreham,* 382 F.2d 929 (5th Cir. 1967), *cert. denied,* 390 U.S. 1014 (1968) (holding that the Louisiana severance tax could not constitutionally be imposed on the severance of oil and gas by a lessee under a mineral lease from the United States on federal land in Louisiana).

With the First Use Tax, however, Louisiana tries to accomplish indirectly what it cannot do directly. An avowed purpose of the Louisiana First Use Tax is to compensate the state for the alleged environmental damage caused by the severance of natural gas beyond the boundaries of Louisiana. La. Rev. Stat. Ann. § 47:1301B (West Supp. 1979). It is also justified as an attempt to remedy the alleged discriminatory effect of the state's own severance taxes on Louisiana natural gas producers. La. Rev. Stat. Ann. § 47:1301A (West Supp. 1979). The tax is imposed only if no state

severance tax is due or has been paid on the gas and is set at the same rate as the severance tax. La. Rev. Stat. Ann. § 47:1303 (West Supp. 1979). Taxpayers liable for First Use Tax may credit that liability against their liability for the Louisiana severance tax. La. Rev. Stat. Ann. § 47:647 (West Supp. 1979). The tax is imposed on the volume of the gas, La. Rev. Stat. Ann. § 47:13 (West 1970), and thus is aptly categorized as a tax on the gas itself. *See Portland Pipeline Corp. v. Environmental Improvement Commission,* 307 A.2d 1, 33-34 (Me.), *appeal dismissed,* 414 U.S. 1035 (1973). Although the First Use Tax proclaims that it should not be construed as imposing a tax on the production, severance, or ownership of natural gas produced outside the boundaries of Louisiana, La. Rev. Stat. Ann. § 47:1303E (West Supp. 1979), the clear thrust of the statute is to impose a severance tax on natural gas produced outside Louisiana. Moreover, the tax is aimed at the gas of the outer Continental Shelf. La. Rev. Stat. Ann. § 47:1301 (West Supp. 1979). Despite the defendant's protestations that the First Use Tax is not a tax on the gas or its severance, the statute by exemption, credit, and passthrough ensures that the burden of the tax will fall on Continental Shelf gas and ultimately on the out-of-state consumer. It was this kind of consumer exploitation that this Court condemned in *Atlantic Refining Co.*

The Louisiana First Use Tax contradicts the express language of the Act as well as its statutory purpose of providing for the orderly development of offshore resources and natural gas development on the outer Continental Shelf.[23] For these reasons, the tax violates the supremacy clause and is void in its entirety.[24]

[23] It cannot be disputed that orderly development of outer Continental Shelf resources would be severely disrupted if other coastal states implemented measures such as the First Use Tax to obtain windfall benefits from new gas and oil discoveries on the Shelf.

[24] Even Louisiana's purported rationales for the First Use Tax raise questions under the supremacy clause. The First

II.

THE LOUISIANA FIRST USE TAX VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

The commerce clause, U.S. Const. art. I, section 8, cl. 3, provides that Congress has the power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

This grant of power to Congress constitutes a withdrawal of power from the states. *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 328 (1977). Specifically, the commerce clause mandates that a state tax on interstate commerce must be: (1) "fairly apportioned"; (2) "not discriminat[ory] against interstate commerce"; (3) "applied to activity with a substantial nexus with the State"; and (4) "fairly related to the services provided by the State." *Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734, 750 (1978). If a state tax fails *any one* of these four tests, it

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Use Tax states its concern with the physical and economic waste of Louisiana's gas. La. Rev. Stat. Ann. § 47:1301A (West Supp. 1979). This concern does not support a tax on interstate gas, however, because the economic waste of such gas is a matter of exclusive federal jurisdiction. FPC v. Transcontinental Gas Pipeline Corporation, 365 U.S. 1 (1961). To the extent that the Louisiana statute purports to be concerned with the physical waste associated with natural gas severance from the outer Continental Shelf, Congress has deemed this a federal concern, *see* 43 U.S.C. § 1334(a)(1) (1976), *as amended by* Act of Sept. 18, 1978, Pub. L. No. 95-372, 92 Stat. 636 (codified at 43 U.S.C.A. § 1334(a)(1) (West Supp. 1979)) (authorizing the federal government "to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, . . ."), and has enacted specific schemes for the management of and compensation for such waste. *See* Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1976), *as amended by* Act of July 26, 1976, Pub. L. No. 94-370, 90 Stat. 1013 (codified at 16 U.S.C.A. §§ 1451-1464 (West Supp. 1979)), and Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (codified at 43 U.S.C.A. §§ 1331-1356 (West Supp. 1979)).

must be held unconstitutional as a violation of the commerce clause. The plaintiff states submit that the Louisiana First Use Tax — which is designed to be, and unquestionably is, a tax upon interstate commerce — fails all four tests. Moreover, as a matter of law, on its face, the First Use Tax discriminates against interstate commerce and is not fairly apportioned. Because no factual development is necessary for the determination of either of these issues, this Court can and should proceed to grant the plaintiff states judgment on the pleadings on these grounds. *See Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977) (discrimination against interstate commerce); *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157 (1954), *approved in Department of Revenue of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. at 749 n.18 (fair apportionment).

A. *The First Use Tax Is a Tax On Interstate Commerce.*

In measuring the validity of a state tax against the commerce clause, the threshold question to be answered is, "Does the tax reach interstate commerce?" The First Use Tax clearly does, for this Court has specifically held that the flow of natural gas in pipelines to points outside a state constitutes interstate commerce. *FPC v. East Ohio Gas Co.,* 338 U.S. 464, 467 (1950); *United Fuel Gas Co. v. Hallanan,* 257 U.S. 277 (1921). Indeed, the transmission of natural gas by high pressure pipelines is a national, not local, activity and constitutes interstate commerce whether within or without the state. *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465, 470 (1931).

A state may not directly tax the flow of natural gas in interstate commerce. In *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954), the Court held that a state tax on gathering gas could not survive the commerce clause test:

> [A]s a basis for finding a separate local activity, the incidence must be a more substantial economic factor than the movement of the gas from a local outlet of one owner into the connecting interstate pipeline of another.

347 U.S. at 169.

The "uses" taxed by the First Use Tax are not "separate local activities" that may permissibly be taxed. The sale of the gas, or transfer of possession, control, or title, does not take the gas out of interstate commerce. *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U.S. 465 (1931). *Accord, Illinois Natural Gas Co. v. Central Illinois Public Service Co.,* 314 U.S. 498, 503-04 (1942). Nor may the tax be levied upon the transportation of the gas, or upon "other ascertainable action." Because the gas has not passed into the distribution system for delivery to consumers, it may not be taxed by the state.

The Court will note that in its answer (¶¶ XXXIV, XXXV, & LXX) the defendant State of Louisiana denies that the First Use Tax reaches interstate commerce. As demonstrated above, however, the defendant's assertions are simply unsupportable. Louisiana, by bold allegations, cannot make that which has already been decided as a matter of law by this Court into an issue of fact.

B. *The First Use Tax On Its Face Discriminates Against Interstate Commerce.*

Louisiana, in its answer (¶¶ XL & XLI), similarly maintains that the First Use Tax does not discriminate against interstate commerce. This is a legal conclusion (an incorrect one) rather than a matter of fact and thus presents no bar to a decision by this Court on the question at the present juncture. Indeed, only two years ago the Court, without any proof of facts, held a state tax to discriminate against interstate commerce in

violation of the commerce clause. *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 328 (1977).

The plaintiff states submit that the First Use Tax must similarly be held, as a matter of law, to discriminate against interstate commerce. The test of discrimination articulated by this Court is as follows:

> Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state.

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 70 (1963). Applying this test, it seems clear that the First Use Tax unfairly discriminates against interstate commerce in three respects. First, the tax is discriminatorily imposed only on gas imported into Louisiana (whether from a sister state or from outside the United States). Such gas is moving in interstate or foreign commerce at the time it is transported into Louisiana and continues in interstate commerce, without interruption, until it is transported out of, or is sold at wholesale for ultimate consumption within, Louisiana.[25] An equivalent tax is not imposed on gas produced in Louisiana or on gas transported into Louisiana from a state that imposes a severance tax. Yet the post-production flow of such gas enjoys the same protections and privileges and subjects Louisiana's environment to the same purported damages as outer Continental Shelf and other imported gas. In practical effect, what purports to be a tax on the "use" of natural gas within Louisiana is in fact a tax on the transmission of outer

[25] Louisiana insulates from the burden of the First Use Tax certain sales at wholesale for ultimate consumption in Louisiana. This is accomplished by the Tax Credit for Electric and Natural Gas Service, La. Rev. Stat. Ann. § 47:11 (West Supp. 1979). This legislation further evidences Louisiana's systematic efforts to assure that the First Use Tax burdens only out-of-state consumers.

Continental Shelf and other imported natural gas into and through Louisiana in interstate commerce.

Louisiana maintains in its answer (¶ XL) that the First Use Tax does not discriminate against interstate commerce "because an equivalent tax is in fact imposed as a severance tax upon all gas produced within" Louisiana and sold elsewhere. While it is true that natural gas produced in Louisiana is subject to a severance tax at a comparable rate, the First Use Tax is clearly not an "equivalent tax" because the severance tax is by definition intended to compensate the state for the depletion of its natural resources, a depletion to which outer Continental Shelf and imported natural gas simply do not contribute.

This Court has specifically recognized that even when out-of-state taxpayers are taxed at the same rate but by a different tax than is imposed on instate taxpayers, the out-of-state taxpayer is likely to incur a heavier burden. *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. at 76. In *Halliburton* the Court struck down another Louisiana use tax on commerce clause grounds. In his concurring opinion, Mr. Justice Brennan noted that even though the out-of-state taxpayer was taxed at the same rate as the instate taxpayer, "the in-state seller is somewhat likelier to absorb some part of the sales tax burden than is the out-of-state seller to absorb the burden of the use tax which his customer eventually must pay." *Id.* Nor can the defendant successfully maintain that the First Use Tax is equivalent to the severance tax because Louisiana exempts from the First Use Tax natural gas subject to another state's severance tax: this gas will not be subject to any Louisiana Tax.

In addition, the burden of the First Use Tax and the severance tax do not fall on similarly situated taxpayers as required by *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. at 70. Louisiana law allows contract

provisions that shift the severance tax burden to the producer. La. Rev. Stat. Ann. § 47:633.1 (West 1970). Thus the buyer of Louisiana-produced gas may contractually impose the severance tax burden upon the producer, whereas the buyer of outer Continental Shelf gas is affirmatively prevented from obtaining reimbursement from the producer. This taxing scheme clearly treats similarly situated taxpayers differently and discriminates against interstate commerce.

Another way in which the First Use Tax discriminates against interstate commerce is that the severance tax credit portion of the statute, La. Rev. Stat. Ann. § 47:647 (West Supp. 1979), permits taxpayers liable for the First Use Tax to credit that liability, dollar-for-dollar, against their liability for Louisiana's severance tax, which is set at the same rate of seven cents per Mcf, up to the amount of that liability. The First Use Tax, applied in conjunction with the severance tax credit, discriminates against (and is designed to discriminate against) interstate commerce because it favors pipeline companies that produce natural resources subject to the Louisiana severance tax and burdens those that do not.

Finally, the First Use Tax discriminates against interstate commerce because it exempts from liability for the tax volumes of natural gas, otherwise subject to the tax, consumed in specified uses in Louisiana. Volumes of natural gas subject to the tax consumed in similar uses in other states are not given an equivalent exemption. Thus, Louisiana has favored certain instate uses, such as the production within Louisiana of sulphur, fertilizer, and anhydrous ammonia, to the disadvantage of similar out-of-state uses. La. Rev. Stat. Ann. § 47:1303A (West Supp. 1979). *See also* La. Rev. Stat. Ann. § 47:11 (West Supp. 1979) (insulating certain instate utilities from the burden of the First Use Tax by providing tax credits).

C. *The Louisiana First Use Tax Is Not Fairly Apportioned.*

Not only does the First Use Tax discriminate against interstate commerce, it also is unfairly apportioned. Predictably, Louisiana denies this in its answer (¶ XXXVII). The plaintiff states, however, submit that this denial, like the defendant's allegation that the First Use Tax does not discriminate against interstate commerce, is a legal conclusion, and an incorrect one at that. Thus, this denial puts no material fact in dispute and hence in no way hinders this Court from concluding that as a matter of law the First Use Tax is not fairly apportioned.

The First Use Tax is not fairly apportioned because it is not related to the taxpayer's investment in facilities, actual business activities, gross receipts, payroll, or any other identifiable activity within the State of Louisiana. The tax is a tax on outer Continental Shelf gas, not on local activities. Notwithstanding the assertion by Louisiana to the contrary, La. Rev. Stat. Ann. § 47:1303E (West Supp. 1979), the tax is, in economic effect, a severance tax on gas produced *outside of* Louisiana. *Cf. Portland Pipeline Corp. v. Environmental Improvement Commission,* 307 A.2d 1, 33-34 (Me.), *appeal dismissed,* 414 U.S. 1035 (1973). Indeed the gas itself may be seized if the tax is unpaid. La. Rev. Stat. Ann. § 47:1306B (West Supp. 1979).

This Court in recent years has approved a tax as apportioned properly only when that tax was levied solely on the *value* of an *identifiable activity* which occurred *within* the state. *Department of Revenue of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Here, the activity which occurs within the State of Louisiana is the transportation and processing of natural gas dedicated to interstate use. Therefore, while it can be said that an

identifiable portion of that activity occurs within Louisiana, the measure of the gas is totally unrelated to that identifiable portion. Instead, in the case at hand, the tax is measured by the *total volume* of natural gas shipped through Louisiana. Thus the First Use Tax is not in any way apportioned to the activities occurring in Louisiana.

Those identifiable activities related to interstate natural gas are subject to a comprehensive program of taxation in Louisiana. For instance, the pipelines involved in the transportation of the gas against which Louisiana assesses the First Use Tax already pay an Ad Valorem Property Tax assessed against the gross value of all property owned by the pipelines in the state, La. Rev. Stat. Ann. § 47:1951 (West 1950); a Royalty Gas Excise Tax assessed against the market value of gas, La. Rev. Stat. Ann. § 47:691 (West 1970); a Natural Gas Franchise Tax assessed against 1% of the gross receipts in the State of Louisiana, La. Rev. Stat. Ann. § 47:1031 (West 1970); an Income Tax based upon gross income from Louisiana state activities, La. Rev. Stat. Ann. §§ 47:21-298 (West 1970 & Supp. 1979); and an Occupational License Tax based upon the gross receipts in state, La. Rev. Stat. Ann. § 47:358 (West 1970).[26] The plaintiff states do not suggest that any of these Louisiana taxes on specific measurable values of natural gas are unfairly apportioned. They do submit, however, that the First Use Tax, which attempts to tax the total volume of natural gas rather than an identifiable portion of its value, is clearly unfairly apportioned.

Moreover, this failure to apportion exposes interstate gas to the unconstitutional "burden of multiple taxa-

[26] In addition, Louisiana has enacted its own Coastal Zone Management Act, La. Rev. Stat. Ann. §§ 49:213.1-.21 (West Supp. 1979), which requires the pipeline companies to obtain coastal use permits.

tion." *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458 (1959). If Louisiana is permitted to impose this unapportioned tax, every other state will be invited to tax the volume of gas passing through its territory. Thus, the Louisiana First Use Tax, if permitted to stand, would set a precedent that would constitute an enormous burden on interstate commerce.

In a case involving a taxing scheme markedly similar to the one at issue here, this Court held the tax unconstitutional precisely because it would "permit a multiple burden" on interstate commerce. *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157, 170 (1954). In that case, Texas levied a tax on the entire volume of natural gas "gathered" within the state. "Gathering" was, the Court noted, artificially defined as the first taking or first retaining of possession of such gas.[27] *Id.* at 164. The Court held the statute unconstitutional, reasoning that "if Texas may impose this 'first taking' tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal rights to tax the first taking or 'unloading' from the pipeline of the same gas when it arrives for distribution." *Id* at 170. Furthermore, "Oklahoma might then seek to tax the first taking of the gas as it crossed into that state" and the "net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate." *Id.* No facts were presented by the taxpayer to support this multiple burden argument. Rather, the Court was satisfied that the activity taxed was so closely related to interstate commerce that the risk of multiple taxation was not constitutionally permissible.

[27] As the Court also noted, the interstate pipeline companies in *Michigan-Wisconsin,* like the interstate pipeline companies here, "exclusive of the tax in question," paid "an ad valorem tax on all facilities and leases within the state." *Id.* at 163.

In the case at hand, the activity taxed, *i.e.*, the "use," is similarly so closely related to interstate commerce that the risk of multiple taxation is simply not constitutionally permissible. The definition of "use" in the First Use Tax like the definition of "gathering gas" in the *Michigan-Wisconsin* case, is a "beggared definition," *id.* at 164, because the word "use" in effect encompasses any possible activity affecting the natural gas. In its normal economic sense, use refers to an ultimate consumption of a good, either immediately or over a period of time. Thus, a tax imposed on use in that sense is not capable of duplication, since the same object can only be used once. However, given the statutory definition of use in the First Use Tax, the tax could be duplicated by every other state between Louisiana and the state in which the natural gas is ultimately distributed and the same volume of natural gas could be taxed many times over.

For this reason, when the analysis of *Michigan-Wisconsin* is applied to the case at hand, the plaintiff states submit that the First Use Tax must similarly be held unconstitutional because it would permit the "burden of multiple taxation" to fall on interstate commerce. Moreover, it is crystal clear that this analysis in *Michigan-Wisconsin* is still controlling and thus applicable here, for this Court specifically approved it just last term:

> This court [in *Michigan-Wisconsin*] declared the tax unconstitutional because it amounted to an unapportioned levy on the transportation of the entire volume of gas. The exaction did not relate to the length of the Texas portion of the pipeline or to the percentage of the taxpayer's business taking place in Texas. Today's decision does not question the *Michigan-Wisconsin* judgment, because Washington apportions its business and occupation tax to activity within the State. *Taxes that are not so apportioned remain vulnerable to Commerce Clause attack.*

Department of Revenue of Washington v. Association of Washington Stevedoring Companies, 435 U.S. 734, 749 n.18 (1978) (emphasis added).

The First Use Tax is, as demonstrated above, "not so apportioned." Accordingly, it must be held to violate the commerce clause.

III.

THE PLAINTIFF STATES ARE ENTITLED TO JUDGMENT ON THE PLEADINGS.

As demonstrated in the first and second arguments above, the supremacy clause and commerce clause claims pressed in this motion raise purely legal questions. Thus, judgment on the pleadings is appropriate.

It is true that the answer of the defendant State of Louisiana contains pro forma denials or contradictions of material allegations of the complaint and that it asserts that "many factual controversies have been raised by the pleadings." Answer ¶ LXX. None of these mock denials, contradictions, or assertions, however, prevents the entry of judgment on the pleadings because it is obvious that all of the facts material to the determination of this controversy in its present posture have been admitted by Louisiana in its answer, already found authoritatively by this Court, or are otherwise subject to its judicial notice. *United States v. Louisiana,* 363 U.S. 1 (1960); *Fletcher v. Evening Star Newspaper Co.,* 133 F.2d 395 (D.C. Cir. 1942) (court can take judicial notice of its own records or of other cases dealing with the same subject matter or questions of a related nature); 6 J. Moore, W. Taggart, & J. Wicker, Moore's Federal Practice ¶ 56.11[9], at 56-297 (1976) ("The proposition that a court may take judicial notice of its records and files has frequently proved useful in summary judgment proceedings."). *Cf. United States v. John J. Felin & Co.,* 334 U.S. 624, 639 (1948) ("It is as old as the common law that an allegation purporting to

be one of fact but contradicted by common knowledge is not confessed by a demurrer."). Thus, although judgment on the pleadings is not appropriate if a material issue of fact exists, federal courts "have been firm in requiring that the issues be genuine and not based on mere pro forma denials or sham or patently false assertions in the pleadings." 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1368, at 696 (1969). *See Hargis Canneries, Inc. v. United States,* 60 F. Supp. 729 (W.D. Ark. 1945) ("The motion for judgment on the pleadings admits all facts well pleaded, but does not admit conclusions of law; facts which the court will take judicial notice are not true; legally impossible facts; facts which would be inadmissible in evidence in the event of a trial nor facts which might appear by a record or document included in the pleadings to be unfounded.").

Louisiana argues that it should be allowed to present evidence of the factual basis of its defense in order to prove:

> (1) The close connection between the activities being taxed and the State of Louisiana;
>
> (2) The nature and extent of environmental damage sustained by Louisiana as a consequence of the taxed activity associated with the preparation for marketing of the affected gas;
>
> (3) The additional and substantial costs and burdens imposed upon state and local government as a consequence of the activities necessary to develop and market the gas affected by the tax;
>
> (4) The non-discriminating character of the tax in question;
>
> (5) A rational and reasonable basis and public policy in support of the First Use Tax, its stimulation of energy production, and its fair contribution to the support of the costs, burdens, risks, and hazards necessarily resulting to Louisiana or any other state of first entry of OCS gas;

(6) The nature of and necessity for the taxed activities prior to marketing of the gas for ultimate consumption;

(7) That the gas affected by the tax is not in interstate commerce at the time of occurrence of any local use taxed; and

(8) That the tax in question has no effect on gas characterized as an import from a foreign country.

Answer ¶ LXX.

The plaintiff states believe, however, that the Court should not receive evidence on these subjects because they are either legal conclusions or irrelevant to the grounds pressed by the plaintiff states in their current motion. For example, the subjects of paragraphs (1), (2), (3), (5), (6), and (8) are irrelevant to any of the commerce clause issues that are pressed in this motion and are wholly irrelevant to the supremacy clause questions. The subjects of paragraphs (4) and (7) in the defendant's parade of purported factual questions are similarly irrelevant. They address mere legal conclusions. Discrimination against interstate commerce, the subject of paragraph (4), is determinable in the absence of a factual record. *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977). Similarly, whether the gas in question is in interstate commerce, the subject of paragraph (7), is a legal question that this Court has already authoritatively determined in the affirmative. *FPC v. East Ohio Gas Co.,* 338 U.S. 464, 467 (1950). Thus, the plaintiff states urge that the Court need not receive evidence on these issues in determining their motion for judgment on the pleadings.

CONCLUSION

Whether the First Use Tax is characterized as a tax on natural gas, its out-of-state severance, or its interstate transmission, the tax violates the Constitution. For all of the reasons stated above, this Court should now enter a decree granting judgment as prayed in the complaint of the plaintiff states, specifically, declaring and adjudging, pursuant to 28 U.S.C. § 2201 (1976), that the Louisiana First Use Tax is unconstitutional and unenforceable with respect to natural gas transported or sold in interstate or foreign commerce; issuing a permanent injunction prohibiting defendant and its agents and employees from collecting the First Use Tax with respect to natural gas transported or sold in interstate or foreign commerce; ordering that any and all revenues collected pursuant to the First Use Tax with respect to natural gas transported or sold in interstate commerce be refunded to the taxpayers together with interest thereon; and granting the plaintiff states their costs herein expended and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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APPENDIX

First Use Tax Natural Gas

ACT NO. 294

HOUSE BILL NO. 768

An Act to amend Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 by adding thereto a new Chapter to be designated as Chapter 16 thereof to contain a Part I comprising Sections 1301 through 1307, providing for the levy and collection of a tax on the first use, in the state of Louisiana, of natural gas produced outside of the territorial limits of the state of Louisiana, which is not subject to the levy of an import tax or customs duty by the United States as an import from a foreign country, and upon which no severance tax or tax upon the volume of production has been paid to any state or territory of the United States; providing a definition of first use and for other definitions; providing for exclusions from the tax; providing for the imposition and rate of the tax; declaring certain contractual agreements unenforceable; providing for the point at which the gas is measured and the tax assessed; providing for the reporting and collection thereof and promulgation of regulations; providing for commingling; providing penalties; providing for the disposition of the collections of the tax; and providing otherwise both generally and specifically with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Chapter 16 of Subtitle II of Title 17 of the Louisiana Revised Statutes of 1950 containing a Part I and comprising Sections 1301 through 1307 of Title 47 is hereby enacted to read as follows:

CHAPTER 16. FIRST USE TAX

Part I. First Use Tax On Natural Gas

§ 1301. State policy

A. The conservation of natural resources is of vital concern to the present and future welfare of our state

and nation, and it is the policy of the state of Louisiana, in the exercise of its police and taxing power, to prevent the physical and economic waste of its natural resources. It is recognized that other existing laws providing limitations upon the production of oil and gas are allowed within the state, and the imposition of a tax upon the severance of these natural resources from the soil and water of the state fail to prevent the economic waste of these Louisiana natural resources and will unfairly tax Louisiana producers in a discriminatory fashion, unless the state equally and uniformly taxes the introduction for the first time into the economy of the state natural gas which has not been otherwise or elsewhere subject to taxation by or within the United States.

B. The waterbottoms, barrier islands and coastal areas within this state are also valuable natural resources, as they provide essential habitat for many forms of wildlife and aquatic life in Louisiana, help protect our coastline from erosion, and are of aesthetic, commercial and recreational value to the citizens of our state and nation. It is further recognized that while other existing laws, applicable to the production of oil and natural gas, provide recompense in the form of taxes to the people of the state of Louisiana for adverse effects on the natural resources, barrier islands, waterbottoms, and shorelands of this state, these laws fail to provide protection for such valuable natural resources or compensation to the people of Louisiana for the necessary adverse effects caused by entry for use for the first time in Louisiana, under the protection of the state's laws, of natural gas which has not been subject to taxation otherwise or elsewhere by or within the United States unless the state levies an equitable tax thereon.

C. It is one of the express purposes of this tax to require the exaction of fair and reasonable compensation to the citizens of this state for the costs incurred and paid with public funds, which costs enure solely to the benefit of the owners of natural gas produced

beyond the boundaries of Louisiana, although introduced into the state, and to provide some measure of reimbursement to the citizens for damages to the state's waterbottoms, barrier reefs, and sensitive shorelands as a direct consequence of activity within the state associated with such natural gas by the owners thereof.

§ 1302. Definitions

The definitions hereinafter set forth shall have the meanings ascribed to them unless the context of use clearly indicates otherwise:

(1) "Oil, condensate, distillate or similar hydrocarbons" are liquid hydrocarbons remaining in a liquid state at 15.025 pounds per square inch absolute and sixty degrees Fahrenheit.

(2) "Natural gas" is natural or casinghead gaseous phase hydrocarbons remaining after separation from either oil, condensate, or distillate and measured at a pressure base of 15.025 pounds per square inch absolute at a temperature base of sixty degrees Fahrenheit.

(3) "Processing" is the scrubbing of a natural gas stream by specifically applied mechanical processes of absorption, adsorption, compression, cooling, cryogenics, refrigeration or any combination thereof for the purpose of extracting natural or casinghead gasoline, methane, ethane, propane, butane and other liquefiable hydrocarbons.

(4) "Refining" is the process by which crude oil, distillate and condensate are separated or fractionated into the various component parts or purified.

(5) "Storage" means and includes any keeping or retention in this state of oil and natural gas.

(6) "Measurement" is any process by which the volume of natural gas affected by this Part is determined.

(7) "Sale" is the transfer of ownership of and title to natural gas from one person to another for valuable consideration.

(8) "Use" is: the sale; the transportation in the state to the point of delivery at the inlet of any processing plant; the transportation in the state of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the state; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point within the state.

(9) "Owner" is the person or person having title to and the right to alienate the natural gas subject to the tax at the time a use occurs in the state. It shall not include any person to whom temporary possession or control has been transferred. In the event of a sale the purchaser shall be deemed the owner.

§ 1303. Imposition; exclusions; commingling

A. Pursuant to the exercise of the police and taxing powers of the state for the purpose of preventing economic and physical waste of our natural resources and for protecting and providing compensation for adverse effects upon the state's shorelands, waterbottoms and barrier islands, there is hereby levied and imposed a tax upon the first occurrence within this state of any use, as defined in this Part, of any natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to this state or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country. The tax levied herein shall not apply to natural gas otherwise subject thereto when such gas is used or consumed in the drilling for or production of oil, natural gas, sulphur, or in the processing of natural gas for liquids extraction within the state; nor shall it apply to gas shrinkage volumes attributable to the extraction of ethane, propane, butanes, natural or casinghead gasoline or other liquefied hydrocarbons, provided shrinkage volumes shall not exceed equivalent gas volumes of the extract-

ed liquids computed by recognized conversion factors used by the Gas Processors Association nor shall it apply to natural gas used or consumed in the manufacture of fertilizer and anhydrous ammonia within the state.

B. The tax imposed by Subsection A of this Section shall be computed at a rate of seven cents on each unit of natural gas as to which a use first occurs within the state. For the purposes of this tax a unit shall be one thousand cubic feet of natural gas as measured at a pressure base of 15.025 pounds per square inch absolute and at a temperature base of sixty degrees Fahrenheit.

C. In furtherance of the public policy and purpose set forth in Section 1301 of this part, and particularly Subsection C of said Section, this tax shall be deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas. Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent. Notwithstanding any such agreement or contract, such an owner shall not have an enforceable right to any reimbursement or refund on the basis that this tax constitutes a cost incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, or that this tax constitutes any other grounds for reimbursement or refund under such agreement or contract, unless there has been a final and unappealable judicial determination that such owner is entitled to such reimbursement or refund, notwithstanding the public policy and purpose of this part and the foregoing provisions of this Subsection C. In any legal action pursuant to this Subsection, the state shall be an indispensable party in interest.

D. When natural gas subject to the tax levied in this Part is commingled with oil and/or natural gas not

subject to the tax levied herein, it shall be presumed that the volumes withdrawn from the commingled mass by the first use shall be in the same ratio as the ratio of the resources entering the commingled mass.

E. Nothing in this Part shall be construed as imposing any tax on the production, severance, or ownership of natural gas produced outside of the boundaries of the state of Louisiana, it being the intention of this Part that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use within the state.

F. If any use as defined in this Part and first occurring is determined not to be a constitutionally taxable incident, the tax shall be imposed upon the use first occurring thereafter.

§ 1304. Authority of the collector of revenue to promulgate rules and regulations

The collector of revenue is authorized to promulgate rules and regulations necessary to effect the intent and purpose of this Part, including regulations concerning the measurement of products associated with the incidents taxed herein.

§ 1305. Reports and payments; reimbursement limitations

A. The owner or owners of the natural gas at the time a use first occurs in this state shall file with the Department of Revenue and Taxation on or before the last day of each month following the month of first use, statements on forms procured from the department, showing the volumes, values, owners and such other information as the department may require by law or regulation for computing and assessing the amount of tax due under this Part.

B. The taxes levied by this Part shall be due and payable to the Department of Revenue and Taxation

monthly on or before the last day of the month following the month to which the tax is applicable by the owner or owners of the natural gas stream at the time any use, as defined herein, first occurs within the state.

§ 1306. Delinquent tax; failure to report or pay

A. The tax provided by this Part shall become delinquent after the date fixed for each monthly report to be filed in the office of the collector, and from such time shall be subject to the addition of interest, penalties, and costs as provided in Chapter 18, Subtitle II of this Title.

B. The failure to report or pay, within ninety days, in the manner and at the time required herein, the tax imposed by this Part on the first use of natural gas is unlawful, and the natural gas shall be deemed illegal gas subject to the provisions of R.S. 30:19 and, as such, shall be treated as contraband and shall be seized and sold as provided by R.S. 30:20.

§ 1307. Disposition of collections

The secretary shall remit all collections of taxes provided by this Part each month to the state treasurer, not later than the tenth day of the month following the month in which collections are made. The state treasurer shall credit all such collections to the state treasury.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

This Act shall become effective immediately upon signature by the governor and the adoption by the legislature of House Bill 140 of the 1978 Regular Session; provided however that taxes shall not begin to accrue on natural gas subject to the tax levied by this Part until 7:00 A.M. on April 1, 1979.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Section 4. Notwithstanding the provisions of Section 2 of this Act, in the event that a final and unappealable judicial decision is rendered upholding the right of an owner to enforce a contract or agreement otherwise rendered unenforceable by R.S. 47:1303(C) of this Act, the following consequences shall ensue:

(1) If the right upheld arises from the provisions of a contract or agreement requiring any other party to reimburse or refund to an owner taxes incurred by such owner by virtue of the separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, then the tax levied in this Act shall not be due in respect to natural gas previously and thereafter sold pursuant to any contract or agreement containing such requirement, and the secretary of the Department of Revenue and Taxation shall forthwith return to each taxpayer all taxes previously paid in respect to such natural gas, together with interest at the rate of six percent per annum from the date the taxes were paid; or

(2) If the right upheld arises from the provisions of a contract or agreement requiring any other party to reimburse or refund to an owner costs or expenses incurred by such owner by virtue of separation or processing of natural gas for extraction of liquid or liquefiable hydrocarbons, then this Act shall be null and void and the secretary shall forthwith return to each taxpayer all taxes previously paid, together with interest at the rate of six percent per annum from the date of payment.

All taxpayers receiving refunds and interest pursuant to this Section shall in turn remit such refunds and interest to all other parties from whom they have received payments pursuant to the aforesaid provisions of such contracts.

Approved July 6, 1978.

FIRST USE TAX ON NATURAL GAS —
SEVERANCE TAX CREDIT

ACT NO. 436

HOUSE BILL NO. 1187

An Act to amend Chapter 6 of Title 47 of the Louisiana Revised Statutes of 1950 by adding thereto a new Part I-B, to be comprised of R.S. 47:647; to provide a severance tax credit to persons liable for the payment of the first use tax levied in R.S. 47:1301 through R.S. 47:1307; to provide for the amount of the tax credit; to provide for parish allocations; to provide for regulations; and otherwise to provide with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Part I-B of Chapter 6 of Title 47 of the Louisiana Revised Statutes of 1950, consisting of R.S. 47:647 is hereby enacted to read as follows:

PART I-B. SEVERANCE TAX CREDIT

§ 647. Severance tax credit.

A. Every taxpayer liable for and remitting taxes levied and collected pursuant to R.S. 47:1301 through 1307 and each taxpayer who bears such taxes as a direct result of contractual terms or agreements applied in disregard of R.S. 47:1303C, shall be allowed a direct tax credit, at any time following payment of such tax, but, not in excess of the amount which must be borne by such taxpayer, against severance taxes owed by such taxpayer to the state, the amount of which credit shall not exceed the amount of severance taxes for which such taxpayer is liable to the state as a direct consequence of the privilege of severing natural resources from the surface of the soil or water of the state. A taxpayer who bears any portion of the tax levied pursuant to R.S. 47:1301 through 1307 as a direct result of contractual terms or agreements applied in disregard of R.S. 47:1303C, shall be entitled to a credit under this Section only after there has been a

determination by the Louisiana Supreme Court or the appropriate United States District Court that such taxpayer must bear the tax, provided that if the taxpayer or the state has sought and been denied a preliminary injunction enjoining the application of such contractual terms or agreements sought to be rendered inapplicable by R.S. 47:1303(C), then such taxpayer shall be entitled to a credit under this Section from the date of denial of the preliminary injunction.

B. No tax credit pursuant to this Section shall be allowed for any taxes remitted pursuant to R.S. 47:1301 through 1307 for which a taxpayer has an enforceable right to reimbursement from a third party. A taxpayer claiming any credit under this Section shall furnish to the secretary of the Department of Revenue and Taxation all applicable contracts and other information requested by the secretary, which relate to such taxpayer's possible right to reimbursement. If the secretary determines that the taxpayer has an enforceable right to reimbursement, which the taxpayer is not actually receiving, the secretary shall so rule. Within thirty days of receipt of notice of such ruling the taxpayer shall have the right to appeal such ruling to the Louisiana Board of Tax Appeals which board shall determine in open meeting whether there is sufficient evidence to support the ruling of the secretary. If the board determines that there is not sufficient evidence it shall overrule the secretary and the taxpayer shall not be required to take any other action in order to receive the tax credit provided by this Section. If the board determines that there is sufficient evidence, the taxpayer shall thereafter have a period of ninety days within which to institute any administrative or judicial proceedings necessary to assert such right to reimbursement. The taxpayer shall pursue such administrative or judicial proceedings with due diligence. At all times prior to commencement of such administrative or judicial proceedings and during the pendency thereof, and during any appeals therefrom, the taxpayer shall continue to be entitled to the credit provided in this

Section; provided that if no action is taken by the taxpayer to assert the right to reimbursement within ninety days no further credit shall be granted and the state shall have the right to recover from the taxpayer any credits granted prior to the expiration of such time. If it is determined in any administrative proceedings that a taxpayer has no right to such reimbursement, then the taxpayer shall not be entitled to continue receiving the credit allowed by this Section, unless the taxpayer within the time allowed by applicable law seeks judicial review of such administrative determination and pursues such judicial review to a final and unappealable judgment. If the administrative or judicial determination establishes that the taxpayer has an enforceable right to reimbursement of the taxes levied pursuant to R.S. 47:1301 through 1307, and if the taxpayer is so reimbursed, then such taxpayer shall be liable to the state for additional severance taxes equivalent to the amount of taxes levied under R.S. 47:1301 through 1307 for which such taxpayer has received reimbursement. The taxpayer shall also pay to the state interest on such taxes at the rate prescribed in R.S. 47:1601, accruing from the date on which the credit attributable to such taxes was taken to the date of final payment but only to the extent of any interest which the taxpayer has itself received on the amount of reimbursement.

C. The credit allowed by this Section shall not affect the percentage allocation of severance tax proceeds otherwise due to any parish, and the secretary of the Department of Revenue and Taxation, with the concurrence of the state treasurer shall, by regulation, establish such procedures as may be deemed necessary to provide therefor.

D. The secretary of the Department of Revenue and Taxation shall promulgate rules and regulations necessary for the implementation and administration of the tax credit provided for herein.

Section 2. Notwithstanding the provisions of R.S. 47: 1351, the treasurer shall, after any funds have first been deposited to the credit of the Bond Security and Redemption Fund, pay into the general fund, from the total proceeds of the first use tax authorized by R.S. 47:1301 through 1307, such amounts as are necessary to fully reimburse said general fund for tax credits granted pursuant to this Act.

Section 3. Tax credits authorized by this Act shall not be granted until there has been a final decision upholding the validity of the first use tax authorized and levied pursuant to R.S. 47:1301 through 1307, except to the extent that taxes levied pursuant to said Part are collected without either protest or suit for recovery filed directly by the person claiming the credit. In the event that tax credits authorized under this Act are granted, the recipient thereof shall be deemed to have waived his right to recovery of any taxes paid and collected pursuant to R.S. 47:1301 through 1307 to the extent of the tax credit granted.

Section 4. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 5. All laws or parts of laws in conflict herewith are hereby repealed.

Section 6. The provisions of this Act shall become effective upon the enactment into law of House Bill 768 of the 1978 Regular Session of the Louisiana Legislature.

Approved July 10, 1978.

First Use Tax Trust Fund

ACT NO. 293

HOUSE BILL NO. 767

An Act to amend Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 by adding thereto a new Chapter to be designated Chapter 16 thereof to contain a Part II containing Section 1351, to create and provide for the First Use Tax Trust Fund in the state treasury as a special and irrevocable trust fund for the proceeds to be derived from a first use tax and any new or alternate tax on the same resources; to establish certain accounts within said trust fund to be used for state debt retirement, redemption of outstanding debt, capital improvements of the barrier islands, reefs, and shores of the coastline; and to provide for reimbursement to the general fund for certain tax credits.

Be it enacted by the Legislature of Louisiana:

Section 1. Part II of Chapter 16 of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 containing Section 1351 is hereby enacted to read as follows:

Part II. Use Proceeds

SUBPART A. FIRST USE TAX TRUST FUND

§ 1351. Creation

A. (1) The First Use Tax Trust Fund is hereby created in the state treasury as a special and irrevocable trust fund for the deposit of the proceeds, and investment income derived therefrom, of the first use tax imposed by law in 1978 or thereafter and any new or alternative tax hereafter imposed by law on uses of those resources subject to any such tax. Out of the first proceeds of the first use tax the treasurer shall pay into the State General Fund such amounts as are determined by the secretary of the Department of Revenue and Taxation to be necessary to fully reimburse the State General Fund for monies lost to that fund by reason of the tax credits granted by law

which are related to the imposition of the first use tax. The remainder of such tax proceeds shall be credited to the following accounts, which are hereby created within the First Use Tax Trust Fund, and shall not be deposited in the Bond Security and Redemption Fund or the State General Fund.

(2) Distribution; debt accounts. Seventy-five percent of the proceeds, and all investment earnings derived therefrom, shall be deposited in the Initial Proceeds Account and the Debt Retirement and Redemption Account, which are hereby created, in the following manner:

(a) Initial Proceeds Account. From this portion of the proceeds of the tax, amounts shall be credited to the Initial Proceeds Account until the sum of five hundred million dollars has been so credited. The sum of five hundred million dollars credited to this account from the proceeds of the tax shall be maintained in that amount at all times and, except for investment and except as provided in Paragraph C of this Section, monies in the Initial Proceeds Account shall not be used for any purpose. Monies in this account shall be invested, in accordance with law, and the investment earnings shall accrue to that account.

(b) Debt Retirement and Redemption Account. All proceeds of this portion of the tax over and above the amount required to be credited to and be maintained in the Initial Proceeds Account shall be credited to the Debt Retirement and Redemption Account. Monies in this account shall be invested, and the investment earnings shall accrue to that account. Except for investment, monies in the Debt Retirement and Redemption Account shall be used solely to purchase, in advance of maturity, on the open market any outstanding obligations of the state, or to call, pay, or redeem in advance of maturity any outstanding bonds, notes, or other evidences of state debt, or both. No purchase or redemption of state debt shall be made unless the purchase or redemption results in interest savings to the state. The methods by which this

Section shall be implemented shall be determined by the state treasurer, with concurrence of two-thirds of the members of the State Bond Commission, acting in open session.

(3) Distribution conservation account. Twenty-five percent of the proceeds, and all investment earnings derived therefrom, shall be deposited in the Barrier Islands Conversation Account. The monies in the Barrier Islands Conservation Account shall be invested and the investment earnings shall accrue to that account. Except for such investment, monies in this account shall be used exclusively to fund capital improvement projects designed to conserve, preserve, and maintain the barrier islands, reefs, and shores of the coastline of Louisiana. Only such capital improvements as are contained in the comprehensive capital budget adopted by the legislature each year shall be so funded.

B. The state treasurer shall invest all monies in the accounts created by Subsection A hereof in accordance with the laws governing the investment of idle funds of the state.

C. If the state treasurer determines that the best interest of the state would be served, but only if the Debt Retirement and Redemption Account is not funded or for any reason is depleted, the treasurer, with concurrence of two-thirds of the members of the State Bond Commission, acting in open session, may expend such portion of the investment earnings in the Initial Proceeds Account as are not necessary to provide the balance of five hundred million dollars in the Initial Proceeds Account required by Subsection A hereof for any purpose for which the Debt retirement and Redemption Account may be used.

D. The funds deposited in the First Use Tax Trust Fund shall be considered escrowed and shall not be used for any of the purposes enumerated herein until the proceeds of the first use tax are determined to be available for such uses by the treasurer, with concurrence of two-thirds of the members of the State Bond Commission acting in open session. If by final action of a court of last resort the

tax held in escrow in the state treasury is held to be invalid as to any taxpayer who paid the tax, the taxes paid, with interest accrued thereon, shall be repaid to the taxpayer.

E. The secretaries of the Department of Wildlife and Fisheries, the Department of Natural Resources, and the Department of Transportation and Development shall meet and annually make recommendations to the governor as to capital improvement projects designed to conserve, preserve, restore, and maintain the barrier islands, reefs, and shores of the coastline of the state. The governor shall place such of those projects as he deems to be in the best interest of the state in the comprehensive capital budget for consideration by the legislature. Only those projects approved by the legislature shall be funded.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Section 4. The provisions of this Act shall remain in full force and effect unless expressly repealed.

Approved July 6, 1978.

Tax Credits To Operators Of Electric Generating Plants and Natural Gas Distribution Services

ACT NO. 599

HOUSE BILL NO. 1128

An Act to amend Title 47 of the Louisiana Revised Statutes of 1950 by adding a new Section designated as Section II, relative to tax credits and tax warrants to operators of electric generating plants and natural gas distribution services municipally owned or regulated, or regulated by the Louisiana Public Service Commission and other affected consumers; to provide the basis for such credit or warrant and the amount; to provide for rules and regulations; and to provide otherwise with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Section II of Title 47 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

§ II. Tax credit for electric and natural gas service

A. Recognizing that the state of Louisiana must depend upon natural gas produced in the federal domain of the outer continental shelf as a supplement to its declining domestic supply, and recognizing that this natural gas is regulated exclusively by agencies of the federal government and is therefore outside of the regulatory jurisdiction of the state of Louisiana, and that the necessarily higher transportation and marketing costs for such natural gas results in higher fuel costs for utilities and industries within the state dependent thereon, the following tax credits, being deemed fair and in the best interest of the state, are hereby authorized.

B. Every electric generating plant and natural gas distribution service municipally owned or regulated, or regulated by the Louisiana Public Service Commission and every direct purchaser of natural gas from the owner of the natural gas, other than an owner of natural gas regulated by a municipality or the state, for

consumption only by such purchaser, shall be allowed a direct tax credit against any tax or combination of taxes, other than severance taxes, owed to the state, upon showing that fuel costs for electricity generation or natural gas distribution or consumption have increased as a direct result of increases in transportation and marketing costs of natural gas delivered from the federal domain of the outer continental shelf and upon which such entities are dependent for a portion of their supply. Increased transportation and marketing costs shall not include increases in wellhead prices or increases attributable to inflation factors. In the event that the increase in fuel costs exceeds the tax or combination of taxes owed to the state, every such electric generating plant, natural gas distribution service or other affected purchaser shall be issued tax warrants in amounts not to exceed in the aggregate the difference between the increase in the fuel costs and the tax or taxes owed to the state, which tax warrants may be used in the payment of any tax or combination of taxes owed to any parish, municipality, political subdivision or other taxing authority of the state. Tax credits and warrants shall be issued annually hereunder and shall not exceed two million dollars in the aggregate. No electric generating plant, natural gas distribution service, or other affected purchaser shall be issued tax credits or warrants totaling less than two hundred fifty dollars annually, except that increased costs totaling less than the minimum credit established herein may be carried forward and accumulated for three years from the year in which the increased costs occur in order that the applicant may utilize the tax credit authorized herein prior to the end of the prescriptive period otherwise set forth in this Title. In the event that total increased fuel costs exceed two million dollars in the aggregate, the Secretary of the Department of Revenue and Taxation shall issue tax credits and warrants based on a formula to be fixed by regulation which shall insure each qualifying applicant a proportionate share of the maximum tax credits established herein.

C. The secretary of the Department of Revenue and Taxation shall promulgate rules providing for the determination of the amount of any tax credit or tax warrant provided for herein and for administration of the provisions of this Section.

D. The state shall have a right of recovery of tax credits granted pursuant to this Section in the event that increased transportation and marketing costs for which credits are granted hereunder are reimbursed or refunded for any reason to any entity receiving the credit.

Section 2. Tax credits or tax warrants authorized under this Act shall apply to gas distributed or consumed during the twelve month period subsequent to 7:00 A.M. on July 1, 1979, and each succeeding twelve month period thereafter and shall be verified and issued by the secretary of the Department of Revenue and Taxation on September 15, 1980 and every September 15 of each year following. Tax credits or tax warrants issued under this Part shall be dated no later than September 15 of the year of issuance and the credits or warrants issued hereunder must be utilized by September 15 of the year next following.

Section 3. In the event that the secretary of the Department of Revenue and Taxation issues tax credit warrants for the payment of taxes owed to a parish, municipality, or other political subdivision, the legislature shall include in its next regular session an appropriation to reimburse the parish, municipality, or other political subdivision in an amount not to exceed total tax credit warrants issued hereunder.

Section 4. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable.

Section 5. All laws or parts of laws in conflict herewith are hereby repealed.

Section 6. The provisions of this Act shall become effective on July 1, 1979.

Approved July 12, 1978.